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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-200685 April 13, 1981

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To the President of the Senate and the
Speaker of the House of Representatives

On March 10, 1981, the President's sixth special message for FY ~~fiscal year~~ 1981 was transmitted to the Congress pursuant to the Impoundment Control Act of 1974. The special message proposes three new rescissions of budget authority totalling $128.0 million; 24 new deferrals totalling $825.5 million and revisions to five previously-reported deferrals increasing the amount deferred by $876.4 million as follows:

DEPARTMENT OF THE INTERIOR

R81-35 Office of the Solicitor and
Office of the Secretary
Youth Conservation Corps
1410109

NATIONAL CONSUMER COOPERATIVE BANK

R81-36 Investment in National Consumer
Cooperative Bank
201/21866
200/11866

R81-37 Self-Help Development and Technical
Assistance
280/10201
281/20201

Our comments on the legal aspects of rescission proposals R81-36 and R81-37 are contained in Enclosure I to this report.

In Enclosure I, we conclude that funds proposed for rescission in R81-36 may not be withheld pending congressional consideration of the proposal. Based on the current legislative calendar, the 45-day period of continuous session during which the funds may be withheld pending congressional consideration of a rescission bill will end on May 10, 1981, for rescission proposals R81-35 and R81-37.

016533

OGC-81-7

FUNDS APPROPRIATED TO THE PRESIDENT

D81-79 Appalachian Regional Development
Appalachian Regional Development Programs
11X0090

The justification section of this deferral states that the funds deferred will be available in subsequent years to pay termination costs. The termination costs referred to will result from the President's rescission proposal R81-40, contained in his seventh special message, dated March 17, 1981.

DEPARTMENT OF COMMERCE

D81-80 Maritime Administration
Ship Construction
13X1708

DEPARTMENT OF DEFENSE--CIVIL

D81-81 Corps of Engineers -- Civil
Construction, general
96X3122

DEPARTMENT OF EDUCATION

D81-82 Office of Postsecondary Education
Higher Education Facilities Loan
and Insurance
91X0240

Our decision entitled "Availability of Higher Education Act Loan Funds Under Continuing Resolution," B-201898, February 18, 1981, concluded that the Congress has released $25 million for title VII loans under the continuing resolution, Pub. L. No. 96-534, 94 Stat. 3166, and that these funds are available to the Department of Education for loans.

Prior to our decision, OMB's apportionment form for this account reflected its belief that the funds could not be legally obligated because no appropriation bill had been enacted which authorized the Department of Education to make new loans. Consequently, neither OMB nor the Department of Education included the $25 million in any projections of outlays. OMB now has submitted a deferral of the funds which were the subject of our decision.

DEPARTMENT OF ENERGY

D81-29A Atomic Energy Defense Activities
Atomic Energy Defense Activities,
Operating Expenses
89X0220

D81-83 Energy Programs
Strategic Petroleum Reserve
89X0218

D81-33A Energy Programs
Fossil Energy Construction
89X0214

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

D81-84 Policy Development and Research
Research and Technology
861/20108
860/10108

DEPARTMENT OF JUSTICE

D81-85 General Administration
Salaries and Expenses
1510129

This deferral and the proposal to legislatively transfer funds to another account includes $6.185 million appropriated for the State and Local Drug Grant Program. This program funds seven regional intelligence projects. Agency officials informed us that three of the projects have adequate funding to carry them through the end of fiscal year 1981. However, the remaining four projects will have their program activities curtailed as a result of the deferral and the pending transfer proposal although current staffing levels will be maintained.

The Administration did not include in its fiscal year 1981 budget funds for State and local drug grants. Nevertheless, $9.1 million was appropriated to the Department of Justice for this program. Again, funding is not requested for fiscal year 1982. Consistent with the intent to terminate this program, agency officials told us that this deferral would have been classified as a rescission, but for the proposal to legislatively transfer these funds to the Federal Bureau of Investigation to offset supplemental requirements. Consequently, the Administration

proposed a part-of-year deferral in order to preserve these funds pending Congress' consideration of its transfer proposal.

These funds expire on September 30, 1981. A deferral cannot be used to delay the availability of funds and effectively preclude their obligation until they expire. In such a case, the action would constitute a rescission and the proper proposal would be one under section 1012 of the Impoundment Control Act. Consequently, there are limitations on how long a part-of-year deferral may remain in effect before it constitutes a rescission.

We will monitor this account and expect that should the transfer not be acted on by the Congress, these funds will be released for obligation with enough time remaining in the fiscal year so as not to effectively preclude their obligation before they expire on September 30, 1981.

D81-86 Federal Prison System
Salaries and Expenses
1511060

D81-87 Office of Justice Assistance, Research, and Statistics
Law Enforcement Assistance
15X0400

The agency has informed us that the elimination of these funds through deferral and subsequent legislative transfer to another account will result in 20 positions, originally budgeted for, not being filled. These positions were to be used for the Concentration of Federal Efforts Program, established to coordinate with other agencies Federal juvenile delinquency programs. The people who were to be hired for this program would have been used, in part, to correct problems discussed in GAO's report, "Federal Juvenile Delinquency-Related Activity: Coordination And Information Dissemination Are Lacking" (GGD-79-3, August 3, 1979). Our report recommended that the Attorney General direct LEAA to implement the coordination and information dissemination provisions of the Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. No. 93-415) by providing the leadership that was expected of it in the Federal fight against juvenile delinquency. However, this deferral and the corresponding reduction in staff positions funded is consistent with the President's fiscal year 1982 budget proposal, but not reflected in the special message, to eliminate the Juvenile Justice programs in the Department of Justice in fiscal year 1982.

DEPARTMENT OF LABOR

D81-36A Employment and Training Administration
Employment and training assistance
161/20174

This deferral increases the amount deferred by former President Carter in the third special message, dated January 15, 1981, from approximately $76.7 million to approximately $729.2 million. The Employment and Training Administration programs affected by D81-36A are:

Program	Amount Deferred
Youth Adult Conservation Corps	$ 37,151
Summer Youth Employment Program	$ 39,548
Title II-D, Public Service Employment	$606,572
Title III - Welfare Reform Demonstration Projects	$ 45,816
Total	$729,187

A GAO report examined the success of CETA's title II-D and title VI programs 1/ in moving participants in public service employment (PSE) programs into unsubsidized jobs. "Moving Participants From Public Service Employment Programs Into Unsubsidized Jobs Needs More Attention," HRD-79-101, October 12, 1979. The report concluded that the programs have had limited success. We found that the responsibility for the programs' shortcomings rested largely with the Department of Labor and made various recommendations to the Secretary of Labor which we believed would improve the programs. However, we expressed concern that our recommendations, though generally agreed with by Labor, would not be effectively implemented. The special message expresses many of the same conclusions contained in our report concerning the programs.

1/ The title VI program was the subject of rescission R81-92, proposed on March 17, 1981, in the seventh special message for fiscal year 1981.

The phasing out of PSE programs obviously will impact on those who would be participants in the programs. We reviewed documents from the Department of Labor and found that Labor is taking actions to minimize these impacts. On February 26, 1981, regional administrators were informed that a hiring freeze for title II-D and title VI positions would be implemented effective March 2, 1981. Regional offices were to issue a unilateral modification of the Comprehensive Employment and Training Plan of the prime sponsors to prohibit them from hiring new participants or filling vacancies under titles II-D and VI as of March 2, 1981. (20 C.F.R. 676.16(a) (1980) authorizes the regional administrators to require modifications in funding allocation levels). However, individuals who had been hired, but had not reported prior to March 2, 1981, were allowed to be enrolled in the program if certain administrative procedures had been completed.

On March 2, 1981, regional administrators were informed that the Administration was taking steps to aid States in providing unemployment compensation to CETA workers adversely affected by termination from PSE jobs. Further, on March 13, 1981, the Department of Labor publicly announced, and regional administrators were provided guidance in implementing, a plan to assist persons phased out of PSE jobs in finding unsubsidized employment. The plan included "transitioning" participants into other CETA-funded activities, referring applicants to the local Job Service Office, and utilizing Federal employment and job services. Labor also plans to mitigate the burden on prime sponsors by allowing them to recoup administrative costs based on the original, rather than the reduced, allocation amounts. Additionally, Labor plans to provide additional funds to prime sponsors who were unable to close down operations before accrued costs exceeded their revised allocations.

In response to a congressional inquiry, we are examining related aspects of this deferral and rescission proposal R81-92.

DEPARTMENT OF TRANSPORTATION

D81-88 Office of the Secretary
Transportation Planning, Research, and Development
69X0142

D81-17B Federal Aviation Administration
Facilities and Equipment (Airport and Airway Trust Fund)
69X8107
698/28107
699/38107
690/48107
691/58107

D81-89 Federal Highway Administration
Trust Fund Share of Other Highway
Programs
69X8009

Our comments on deferral proposal D81-89 are contained in Enclosure II to this report.

D81-90 Federal Railroad Administration
Railroad Research and Development
69X0745

D81-91 Federal Railroad Administration
Rail Service Assistance
69X0122

D81-92 Federal Railroad Administration
Northeast Corridor Improvement
Program
69X0123

We are not in a position to assess the merits of this deferral from a fiscal policy viewpoint. However, it should be noted that GAO issued a report (CED-81-23, October 31, 1980) on the impact of work cutbacks similar to those affected by this deferral. The report showed that work cutbacks could result in reduced ontime reliability, reduced passenger comfort, reduced safety for passengers and crew members, and increases in future maintenance costs.

D81-93 Urban Mass Transportation Administration
Urban Mass Transportation Fund
(Urban Discretionary Grants)
69X1119
691/41119

D81-94 Research and Special Programs Administration
Research and Special Programs
6910104
69X0104

VETERANS ADMINISTRATION

D81-95 Medical Care
3610160

D81-96 Medical and Prosthetic Research
360/10161
361/20161
36X0161

D81-97 Medical Administration and Miscellaneous Operating Expenses
3610152

The deferral message D81-95 states that "this deferral action reflects a decision to defer funds for non-direct case staffing of 1,280 full-time equivalents until the fourth quarter." Similar statements are made in deferral messages D81-96 and D81-97 concerning 74 and 14 full-time equivalents, respectively. Agency officials told us, and we agree, that these statements are misleading because they imply that the positions will be funded in the fourth quarter. However, these funds are planned to help offset pay increases and reduce the agency's need for a supplemental appropriation. Consequently, it is likely that the deferrals will result in all or part of these positions going unfunded for the rest of fiscal year 1981.

These deferrals pose a legal issue which GAO addressed in a letter to the Chairman of the Senate Committee on Veterans' Affairs, dated February 19, 1981 (Enclosure III). We concluded that 38 U.S.C. 5010(a)(4) requires the Director of the Office of Management and Budget, in each fiscal year, to provide to the Veterans Administration the full funded personnel ceiling for which the Congress has appropriated funds for the year in three specified accounts. Consequently, we concluded that the funds needed to fill these positions could not be deferred or otherwise withheld during fiscal year 1981 even on the basis of a Government-wide hiring freeze. Deferrals D81-95, D81-96, and D81-97 involve the accounts covered by 38 U.S.C. 5010(a)(4). In the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1981, Pub. L. No. 96-524, 94 Stat. 3045, 3059, the Congress appropriated approximately $6 billion, $132 million, and $51 million, respectively, for "Medical Care," "Medical and Prosthetic Research," and "Medical Administration and Miscellaneous Operating Expenses." The committee reports accompanying the Act, when read with President Carter's budget requests, indicate the following mandated health-care positions under the three accounts:

Medical Care	185,848
Medical and Prosthetic Research	4,418
Medical Administration and Miscellaneous Operating Expenses	832

Medical and Prosthetic Research	4,418
Medical Administration and Miscellaneous Operating Expenses	832

As required by law, the Director of OMB certified in letters to the Chairmen of the House and Senate Veterans' Affairs Committees, dated January 15, 1981, that the following health care positions had been made available:

Medical Care	185,848 2/
Medical and Prosthetic Research	4,443
Medical Administration and Miscellaneous Operating Expenses	853

The effect of the President's deferrals would be to reduce the funded positions from the levels previously released by OMB to the following levels:

Medical Care	184,568
Medical and Prosthetic Research	4,369
Medical Administration and Miscellaneous Operating Expenses	839

In the first two cases, deferrals D81-95 and D81-96 would reduce the funded personnel levels 1,280 and 49 below the mandated levels established by Congress. The level resulting from deferral D81-97 still would be above the mandated level of 832 for Medical Admin-

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2/ Deferral message D81-95 states that 185,869 positions are involved. The additional 21 positions are funded from sources other than the appropriation involved here. Because our discussion concerns the use of funds appropriated to the Medical Care account, the number of positions relevant to our analysis is 185,848. As required by 31 U.S.C. 5010(a)(4)(C), we reported in letters to the Chairmen of the House and Senate Appropriations and Veterans' Affairs Committees that the Director of OMB had complied with 31 U.S.C. 5010(a)(4) by releasing at least the required number of positions to VA. B-198103, February 3, 1981. However, the letter cautioned that any determination that the Director was in compliance with the law would turn on the application of the presidential hiring freeze to such positions.

by Congress. Consequently, we believe that deferrals D81-95 and D81-96 are unauthorized to the extent they result in a reduction in the personnel levels below those mandated by Congress. In the case of D81-95, the entire reduction is unauthorized, and in the case of D81-96, the reduction of 49 positions of the 74 proposed by the President is unauthorized. No similar problem exists with regard to D81-97.

In our February 19, 1981, decision, we noted that OMB officials informally advised us of their view that the required certification did not limit application to these positions of a Government-wide hiring freeze and that a deferral report would satisfy the certification requirement. Subsequently, OMB informally advised us that section 5010(a)(4) is not a mandate which limits the President's authority to propose a deferral under the Impoundment Control Act. Our decision is to the contrary.

Based on the foregoing, we recommend the adoption of an impoundment resolution disapproving deferrals D81-95 and D81-96 on the basis that they are unauthorized under the Impoundment Control Act. This action would require the Administration to make the funds available to fund the positions mandated by the Congress.

D81-98 Construction, Major Projects
36X0110

GENERAL SERVICES ADMINISTRATION

D81-99 Office of Inspector General
4710108

D81-100 Allowances and office staff for former Presidents
4710105

D81-101 Consumer Information Center
4710104

SMALL BUSINESS ADMINISTRATION

D81-41A Business Loans and Investment Fund
73X4154

We commented on the effects of a deferral of funds for SBA's direct loan program in our report on D81-41, proposed by President Carter in the third special message for fiscal year

1981, dated January 15, 1981. We observed that businesses receiving loan assistance through SBA's direct loan program pay a much lower interest rate than businesses participating in SBA's guaranteed loan program. Consequently, the availability of SBA's guaranteed loan program would not aid some businesses affected by the decrease in the direct loan program because they could not afford the guaranteed loan program's higher interest rate. Deferral D81-41A increases the previous amount deferred by $55.9 million and now would affect the guaranteed, as well as the direct, loan program.

D81-102 Surety Bond Guarantees Revolving Fund
73X4156

We have reviewed the sixth special message. Except as noted above, we have identified no additional information that would be useful to the Congress in its consideration of the President's proposals and we believe that the proposed deferrals are in accordance with existing authority.

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosures - 3

Impoundments Affecting the National Consumer Cooperative Bank (R81-36 and R81-37)

ENTITIES INVOLVED

The National Consumer Cooperative Bank and the Office of Self-Help Development and Technical Assistance were created by the National Consumer Cooperative Bank Act, approved August 20, 1978, Pub. L. No. 95-351, 92 Stat. 499. That Act has not been amended for purposes relevant here.

The Bank was created by title I of the Act, 12 U.S.C. 3011-3025. The Bank is a mixed ownership corporation, is an instrumentality of the United States, and is to have perpetual existence unless and until its charter is revoked or modified by Act of Congress. 12 U.S.C. 3011. The Bank makes loans and guarantees loans to eligible cooperatives.

The capital of the Bank consists, in part, of capital subscribed to by the United States through purchases of class A stock. The appropriations to buy this stock are made to the Department of the Treasury. Section 3014(a) provides that beginning with fiscal year 1979, "the United States shall purchase class A stock" (emphasis added), and authorizes appropriations for this purpose. Section 3014(c) provides that class A stock "shall be issued by the Bank to the Secretary of the Treasury in exchange for capital furnished pursuant to subsection (a)." (Emphasis added.)

The Office of Self-Help Development and Technical Assistance was established within the Bank by title II of the Act, 12 U.S.C. 3041-3050. The Office makes capital investment advances to eligible cooperatives out of a separate account in the Bank. 12 U.S.C. 3042, 3043(a). The Office also makes interest supplement advances payable to the Bank or other lenders by a cooperative which the Office determines cannot pay a market rate of interest because it provides goods, services, or facilities to persons of low income. 12 U.S.C. 3043(b). The Office is funded by direct appropriations to the Office.

PROPOSED IMPOUNDMENTS

The President's sixth special message for fiscal year 1981 on March 10, 1981, contains proposals to rescind $59.8 million appropriated to the Department of the Treasury for purchase of the Bank's class A stock (R81-36), and $29.9 million appropriated to the Bank for the Office of Self-Help Development and Technical Assistance (R81-37).

R81-36

This rescission proposal has three aspects. First, the rescission would reduce the funds appropriated to the Treasury to provide capital for the Bank through the purchase of stock. The effect would be to reduce the amount of loans the Bank could make to cooperatives based on capital derived from appropriated funds. The total budgetary resources of $115,798,568 referred to in the special message are comprised of the fiscal year 1981 appropriation to the Department of the Treasury for the purchase of the Bank's class A stock and a carryover of funds appropriated to Treasury in fiscal year 1980 but not yet used to purchase stock. These appropriations are available for 2 years.

However, the rescission proposal's effects go beyond the appropriations for purchase of class A stock. The first sentence of the second paragraph of the suggested rescission bill provides, in part, that:

> "During 1981, within the resources available, gross obligations of the National Consumer Cooperative Bank for the principal amount of direct loans shall not exceed $55,949,284."

The dollar figure specified in the above language represents the total appropriations available for purchase of class A stock less the amount proposed for rescission. Other "resources available" to the Bank, are "paybacks" to the Bank of interest and principal from prior loans, as well as capital from the sale of class B and C stock to private investors and from the issuance of bonds, notes, and debentures.

Prior appropriation acts have placed limits on the amount of direct loans outstanding during the fiscal year from all of the Bank's available resources. However, the limitation always has been greater than the amount appropriated for purchase of class A stock in recognition of the fact that the Bank may make loans out of "paybacks" and other forms of capital. For example, Pub. L. No. 96-526 (December 15, 1980) appropriated $89 million to Treasury for purchase of Class A stock issued by the Bank, but the limitation on loans was $169 million. Rescission proposal R81-36 departs from the past practice. The effect of its reduction in the loan ceiling is greater than that stated in the special message, namely to halt further Treasury purchases of capital stock. The effect also is to halt the Bank's use of "paybacks" and other forms of capital. Congress should be

aware that passage of the President's rescission proposal would preclude the Bank's use of "paybacks" and other forms of capital to make loans. At the same time, it should be noted that the Bank currently has very little in the way of available resources beyond capital acquired through Treasury's purchase of class A stock.

The second aspect of the recission proposal also relates to the suggested language for the rescission bill. As noted above, the language would reduce the current overall limit on direct loans. It goes on to prohibit any further commitments by the Bank to guarantee loans during fiscal year 1981. The ceiling on 1981 loan guarantees is now set at $5 million. See Pub. L. No. 96-526 (December 15, 1980), 94 Stat. 3044, 3055. Under current budgetary practice, neither the overall ceiling on the Bank's direct loans nor the ceiling on its loan guarantee authority is treated as budget authority. Therefore, to the extent that the proposed language would affect these ceilings, it is technically beyond the scope of a rescission bill, defined in section 1011 of the Impoundment Controll Act, 31 U.S.C. 1011(3), to mean--

> " * * * a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President * * *."

The third aspect of proposed recission R81-36 concerns the status of the Bank's resources and authority pending congressional consideration of the proposal. Subject to the limitations contained in Pub. L. No. 96-526, the Bank now has legal authority to guarantee loans and to make direct loans from their existing resources. As we understand it, the Administration does not purport to be withholding these authorizations from the Board. However, OMB has withheld from Treasury appropriations for the purchase of the Bank's class A stock. For the reasons stated below, we believe that this withholding is unauthorized.

As previously discussed, the Federal funds available to finance the Bank come from the Bank's sale of class A stock to the Treasury. Sections 3014(a) and (c) of title 12 use the term "shall" in reference to the Bank's issuance of stock to the Treasury. We believe that use of the term "shall" coupled with the general statutory scheme here involved connotes a mandate to engage in the action described. Consequently, the Secretary of the Treasury has no discretion to refuse to purchase class A stock issued by the Bank within the limits of appropriations made for this purpose.

This conclusion is evident from the legislative history of the Consumer Cooperative Bank Act. Senate Report 95-795 states on page 17 that there are to be three classes of stock in the Bank, including "class A nonvoting, cumulative preferred stock for required purchase by the Secretary * * *." (Emphasis added.) On page 18 of that report, it states that "with respect to government investment, the bill directs the Secretary of the Treasury to purchase class A stock * * *." (Emphasis added.)

If the Congress had wanted the Secretary to have discretion in the purchase of stock, it clearly could have done so. For example, in providing authority for the Bank to obtain funds through its issue of various debt instruments, the statute authorizes the Secretary in his discretion to purchase such instruments. 12 U.S.C. 3017(b). The legislative history also is clear that the Secretary's authority is discretionary. Senate Report 95-795 at page 18. No similar language exists with regard to the Secretary's purchase of class A stock.

Section 1001 of the Impoundment Control Act, 31 U.S.C. 1400, referred to as the disclaimer section, provides in relevant part:

> "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as --
>
> * * * * *
>
> "(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

As previously discussed, funds appropriated to the Secretary are statutorily required to be made available for purchase of the Bank's class A stock. Therefore, we view 12 U.S.C. 3014(a), (c), as falling within the fourth disclaimer of the Impoundment Control Act, cited above. It follows that the Impoundment Control Act cannot be used by the Executive Branch to refuse to make funds available to the Bank through the purchase of the Bank's class A stock.

R81-37

The Federal funds available to the Office of Self-Help Development and Technical Assistance come from direct appropriations

to it. 1/ We find nothing in National Consumer Cooperative Bank Act which mandates that these funds be made available to the Office, or that the Office utilize these funds. Consequently, the Impoundment Control Act may be used to withhold these funds for 45 days of continuous congressional session.

This opinion is not affected by the fact that the Bank, in which the Office is established, is a mixed ownership Government corporation pursuant to 12 U.S.C. 3011. In fact, the declaration of policy for the Government Corporation Control Act, 31 U.S.C. 841, which governs mixed ownership Government corporations, provides that:

> "It is declared to be the policy of the Congress to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof."

Further, the legislative history reflects Congress' intent that the Bank be subject to various forms of Federal supervision so long as there is Federal investment in the Bank, notwithstanding the involvement of private investors. For example, the Senate Committee on Banking, Housing, and Urban Affairs stated on page 20 of the Senate Report 95-795:

> "In order to provide adequate government oversight of the Bank's financial condition and activities during the period of Federal investment in the Bank's capital stock, the Bank's loans, guarantees, borrowings from the Treasury and authorizations during such investment period are subject to the Federal budgetary and appropriations process as long as government owns any capital stock in the Bank."

The Impoundment Control Act provides a mechanism for the President to request that Congress reduce through a rescission

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1/ "Paybacks" to the Bank can also be used for this Office. Thus, the discussion of the effects of proposed rescission R81-36 on such paybacks is also relevant here.

proposal a previous appropriation. Under the statute, the President is allowed to withhold funds for up to 45 days of continuous congressional session pending Congress' consideration of that proposal, except when the relevant statute mandates obligations or expenditure. Since that is not the case here, we conclude that the President's authority to withhold funds under the Impoundment Control Act is available.

IMPOUNDMENT AFFECTING FEDERAL HIGHWAY ADMINISTRATION'S GREAT RIVER ROAD PROJECT (D81-89)

As the President's special message points out, the Great River Road project is subject to several funding authorizations. However, deferral D81-89 concerns that portion of the funding derived from the Highway Trust Fund.

The statutory scheme established by Congress in the Federal-Aid Highway Act involves mandatory apportionments by the Secretary of Transportation to the States. Section 104(b) of title 23, United States Code, provides, in pertinent part, that according to the formula established in the statute--

> "On October 1 of each fiscal year * * *, the Secretary * * * shall apportion the * * * sums authorized to be appropriated for expenditure upon the Federal-aid systems for that fiscal year, among the several States * * *." (Emphasis added.)

Section 118(a) of title 23 provides, in pertinent part, that:

> "* * * sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this title, or under prior acts * * * shall be available for expenditure under the provisions of this title." (Emphasis added.)

Subsection (b) of section 118 provides that sums apportioned shall be available for varying periods of time depending on the type of highway system involved.

Section 120 of title 23 governs what the Federal share will be for projects financed as part of the Federal-aid highways program. The deferral of funds proposed under D81-89 has the effect of altering the Federal share in fiscal year 1981 and is inconsistent with the mandatory provisions of section 118. The proposal also is inconsistent with Congress' intent in establishing the Federal-aid highways program since Congress provided in 23 U.S.C. 101(c), in pertinent part, that:

> "It is the sense of the Congress that under existing law no part of any sums authorized for expenditure

> upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation, for purposes and projects as provided in this title, by any officer or employee in the executive branch of the Federal Government * * * [except in specified circumstances not present here]."

Section 101(c) was enacted in its original form in section 15 of Pub. L. No. 90-495 (1968) in response to an Attorney General's opinion in 1967 holding that impoundment of highway funds was permissible under the Highway Act. Upon subsequent amendment to the Act in 1970, House Report No. 91-1554 stated on page 13:

> "* * * It has been clearly demonstrated that the Federal-aid highway program can operate successfully and efficiently only so long as its planning and programming can be based on an assured comparatively long-term level of financing. The withholding of highway trust funds as an anti-inflationary measure is a clear violation of the intent of the Congress as expressed in section 15 of the Federal-Aid Highway Act of 1968. We again wish to emphasize the clear legislative intent that funds apportioned shall not be impounded or withheld from obligation * * *."

Notwithstanding the above, the Secretary of Transportation impounded funds in 1971 which had been apportioned to the State of Missouri for fiscal year 1971. The State of Missouri sued the Secretary of Transportation. The Court of Appeals for the Eighth Circuit affirmed the decision of the district court and concluded that the provisions of the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. 101 et seq., do not expressly or impliedly authorize the Secretary to withhold the authority to obligate apportioned funds for reasons related to the status of the economy and the need to control inflationary pressures. The State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

Subsequently, Congress enacted the Impoundment Control Act of 1974, Pub. L. No. 93-344, Title X (July 12, 1974); 31 U.S.C. 1400, et seq. Citing the Impoundment Control Act as authority, President Carter proposed on April 16, 1980, in his seventh special message for fiscal year 1980 a deferral (D80-61) of funds apportioned for the Federal-aid highways program which, like the Great River Road program, is funded by the Highway Trust fund. Twelve lawsuits were brought separately against the Secretary of Transportation by various States seeking injunctive relief enjoining the Secretary from refusing to make available the full amount of Federal-aid highway funds legally apportioned to them pursuant to the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. 101 et seq.

The Supplemental Appropriations and Rescission Act of 1980, Pub. L. No. 96-304, 94 Stat. 857, was approved by the President on July 8, 1980. The Act disapproved the President's deferral (D80-61), but implemented variations of parts of the President's proposal by reducing the obligational ceiling for Federal-aid highways and highway safety construction programs and by adjusting the allocation formula for funds not already obligated on the date of the Act's enactment.

The conferees specifically addressed the lawsuits in the conference report with the following explanatory language:

> "The conferees are aware that at least nine states have brought suits challenging the President's deferral of Federal-aid highway obligational authority as well as the method chosen by the Federal Highway Administration to allocate the remaining fiscal year 1980 obligational authority among the states. The conferees are also aware that in some of these suits, district courts have issued orders declaring the deferral and/or the allocation formula illegal and ordering the Secretary of Transportation to take certain actions. It is the intent of the conferees that this legislation, in setting a new statutory obligational ceiling for fiscal year 1980 and in providing a statutory distribution formula, act to moot all aspects of the pending litigation, including any efforts to hold the

> Secretary in contempt of court. The conferees believe that this is essential because of the negative impact that compliance with the terms of those orders would have upon the operation of the allocation formula established by this legislation and upon the entire Federal-aid highway program. Therefore, 'amounts not obligated on the date of enactment of this Act' shall be determined on the basis of actual obligations, without regard to set-asides or other court orders." H.R. Rep. No. 96-1149, 56-57 (1980).

Prior to the enactment of the Act and the subsequent court judgments that the litigation now was moot, five district courts had issued decisions on the legality of the President's deferral proposal. Four of the district courts held in varying degrees that the impoundment was illegal. 1/ These courts, for the most part, endorsed the earlier holding in Volpe. The courts then addressed the issue of whether the Impoundment Control Act, enacted after the decision in Volpe, grants the President authority to impound funds under the Federal-Aid Highway Act that he did not previously have. The courts concluded that the Impoundment Control Act did not authorize the withholding of funds provided under the Federal-Aid Highway Act.

The courts relied, in part, on section 1001 of the Impoundment Control Act, 31 U.S.C. 1400, commonly referred to as the disclaimer section, which provides, in pertinent part, that:

> "Nothing contained in this Act or in any amendments made by this Act, shall be construed as--
>
> * * * * *

1/ State of Arkansas v. Goldschmidt, Civil Action No. LR-C-80-192 (E.D. Ark., May 21, 1980); State of New Mexico v. Goldschmidt, Civil No. 80-247-HB (D.N.M., May 22, 1980); State of Maine v. Goldschmidt, Civil No. 80-0130P (D. Me., June 6, 1980); State of Nebraska v. Goldschmidt, Civil No. 80-L-140 (D. Neb., August 5, 1980) (granting preliminary injunction); contra, State of Alaska v. Goldschmidt, Civil No. A80-140 (D. Alaska, May 21, 1980).

> "(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

Since under Volpe, the statutory scheme of the Federal-Aid Highway Act was a mandatory one, the courts generally ruled that the fourth disclaimer, cited above, precluded any impoundment authority which otherwise would be available.

Though these cases were rendered moot by the subsequent Congressional action, we believe that they are useful in viewing the President's deferral proposal D81-89. The Great River Road project, like those involved in the Federal-aid highway cases, is funded out of the Highway Trust Fund, and is governed by sections 101(c), 104, and 118(b) of title 23. We agree with the courts in the Federal-aid highway cases that the Federal-Aid Highway Act is a statute which requires that funds apportioned to the States be made available to them. Consequently, we believe that this deferral falls squarely within the fourth disclaimer and, therefore, the Impoundment Control Act is not available to the Executive for purposes of withholding funds.

As mentioned, President Carter's deferral of funds for the Federal-aid highways program prompted the filing of 12 lawsuits. To forestall a reoccurrence of legal action, we recommend that this deferral be disapproved by an impoundment resolution as authorized by section 1013(b) of the Impoundment Control Act, 31 U.S.C. 1403(b) on the basis that the deferral is unauthorized.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-198103 February 19, 1981

The Honorable Alan K. Simpson
Chairman, Committee on Veterans' Affairs
United States Senate

Dear Mr. Chairman:

This is in response to your concern as to whether the hiring freeze imposed by President Reagan on January 20, 1981, violates section 5010(a)(4) of title 38 of the United States Code. That section requires the Director of the Office of Management and Budget, in each fiscal year, to provide to the Veterans' Administration the full funded personnel ceiling for which the Congress has appropriated funds for the year in three specified accounts. The hiring freeze, on the other hand, with some exceptions, precludes all Executive branch agencies from hiring any employees after January 20, 1981.

As is our usual practice, we requested the views of the concerned agencies--in this instance, the Office of Management and Budget (OMB) and the Veterans' Administration (VA). We have not yet received the formal written comments of OMB. However, we have been told informally that it is OMB's position that: 1. The Director of OMB has already complied with the statute; 2. the temporary hiring freeze is not inconsistent with the full-time employee equivalent (FTE) certification because the VA could use all available staff years after the freeze is lifted; 3. the required certification does not limit the President's authority to impose a Government-wide hiring freeze; and 4. the certification requirement would be satisfied with a deferral report to the Congress delaying availability of some of the funds appropriated for medical care staffing, to be used later on to partially offset the need for a supplemental appropriation to cover the October 1, 1980, pay raise.

In its response to our inquiry the VA takes the position that 38 U.S.C. § 5010(a)(4) is an absolute mandate to OMB to allow VA to fill all positions for which Congress has appropriated funds, and that the President does not have legal authority to prevent VA from hiring to fill those positions.

We agree with the Veterans Administration. For the reasons indicated below, it is our opinion that the governmental hiring freeze is not applicable to the positions which the Congress has required to be released for fiscal year 1981. We also hold that the funds needed to fill these positions may not be deferred or otherwise withheld during fiscal year 1981.

THE STATUTE

As is relevant to this decision, 38 U.S.C. § 5010(a)(4) provides:

> "(A) With respect to each law making appropriations for the Veterans' Administration, there shall be provided to the Veterans' Administration the funded personnel ceiling defined in subparagraph (D) of this paragraph and the funds appropriated therefore.
>
> "(B) In order to carry out the provisions of subparagraph (A) of this paragraph, the Director of the Office of Management and Budget shall with respect to each such law (i) provide to the Veterans' Administration for the fiscal year concerned such funded personnel ceiling and the funds necessary to achieve such ceiling ***.
>
> * * * * *
>
> "(D) For the purposes of this paragraph, the term 'funded personnel ceiling' means, with respect to any fiscal year, the authorization by the Director of the Office of Management and Budget to employ (under the appropriation accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses) not less than the number of employees for the employment of which appropriations have been made for such fiscal year."

This provision was passed by the Congress in response to actions by the Administration blocking VA from hiring all the health-care employees for which Congress had appropriated funds. The statute was intended to insure that VA was staffed at the level specified by the Congress by preventing the Administration from withholding funded personnel positions from VA. Thus, in the explanatory statement accompanying the compromise bill which contained paragraph 5010(a)(4), the House and Senate Committees on Veterans' Affairs jointly stated:

> "The compromise agreement requires the Director of OMB to provide to the VA the personnel ceiling for VA health-care staffing for which appropriations are made ***.

> "The Committees believe that it is essential that when the Congress appropriates funds specifically designated for VA personnel levels, OMB not thwart the will of Congrss by requiring the VA to use the funds so appropriated for other purposes (as occurred in fiscal year 1979 when funds appropriated for additional personnel were diverted, at OMB's direction, to cover in part the VA's cost of the Federal government pay raise)." 125 Cong. Rec. H11648 (daily ed., December 6, 1979).

Also, in explaining the compromise bill to the House, Representative Hammerschmidt, Ranking Minority Member of the Subcommittee on Medical Facilities and Benefits, Committee on Veterans' Affairs, said:

> "Another provision is aimed at preventing the recurrence of a situation that generated widespread outrage earlier this year. The Office of Management and Budget directed the Veterans' Administration to use funds appropriated by the Congress to prevent the planned closing of hospital beds within the VA medical system for another purpose. The appropriated funds were used, instead, to absorb the Federal pay raise for VA employees and the bed closings went ahead as planned.
>
> "The Director of OMB is required by the bill before us to allocate funds to the VA for the health care staffing Congress intends. ***" 125 Cong. Rec. H11654 (daily ed., December 6, 1979).

See also the statements of Representative Satterfield, Chairman, Subcommittee on Medical Facilities and Benefits (125 Cong. Rec. H11645 (daily ed., December 6, 1979)), and Senator Cranston, Chairman of the Senate Veterans' Affairs Committee (125 Cong. Rec. S17990 (daily ed., December 6, 1979)).

By its terms, the statute requires the Director of OMB to make available to the VA the funds appropriated by the Congress for personnel and to authorize VA to employ at least the number of employees for which funds were appropriated in the three specified accounts. The means for determining the personnel ceiling intended by the Congress was specified in the compromise agreement explanatory statement referred to above:

> "The term 'for which appropriations have been made for ... [a particular] fiscal year' in subparagraph (D) of new paragraph (4) of section 5010(a), as used with respect to an appropriation Act, means the appropriations amount that is identified unequivocally in the legislative history of such Act (including the President's budget submissions for the appropriations account involved) as intended to support a specified employment level." 125 Cong. Rec. H11648 (daily ed., December 6, 1979).

In the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1981, Pub. L. No. 96-526, 94 Stat 3045, 3059, the Congress appropriated approximately $6 billion, $132 million, and $51 million respectively for "Medical Care", "Medical and Prosthetic Research", and "Medical Administration and Miscellaneous Operating Expenses." The committee reports accompanying the Act, when read with the President's budget requests, indicate the following mandated health-care positions under the three accounts:

Medical Care	185,848
Medical and Prosthetic Research	4,418
Medical Administration and Miscellaneous Operating Expenses	832

Under 38 U.S.C. § 5010(a)(4) the Director of OMB is required to authorize VA to fill at least this number of positions, and must make available sufficient funds to pay their salaries.

Subparagraph (C) of paragraph 5010(a)(4) requires the Comptroller General to verify that the Director of OMB has complied with the statute. By letters of February 3, 1981, HRD-81-63 [B-198103], the Comptroller General reported to the Chairmen of the House and Senate Appropriations and Veterans Affairs committees that the Director had released at least the required number of positions to VA. However, the letters cautioned that any determination that the Director was in compliance with the law would turn on the application of the presidential hiring freeze to the VA.

THE HIRING FREEZE

On January 20, 1981, President Reagan issued to the Heads of Executive Departments and Agencies a Memorandum announcing "a strict freeze on the hiring of Federal civilian employees to be applied across the board in the

executive branch." See 46 Fed. Reg. 9907. The Memorandum indicated that the Director of OMB would issue detailed instructions concerning the freeze. The President delegated to the Director of OMB the authority to grant exemptions from the freeze in special circumstances. Thus the Director of OMB is administering the freeze and it is by his directions that Executive Branch agencies are not hiring.

On January 24, 1981, OMB issued Bulletin No. 81-6 providing "for an immediate and total freeze on the hiring of Federal civilian personnel as directed by the President***." The Bulletin directs all Executive Branch departments and establishments to stop all hiring immediately. The Bulletin provides for exemptions from the freeze including "situations where medical, hospital or health care is furnished directly***."

In response to our inquiry we have been informally notified by OMB that the Director of OMB granted a blanket exemption from the freeze to VA with respect to positions delivering direct health-care services (doctors, nurses, dentists, etc.). However the Director denied a blanket exemption for VA administrative and other positions funded under the three specified appropriation accounts. The Director indicated that he would consider requests for exemptions for these positions on a facility by facility basis.

Because all three accounts contain appropriations for personnel other than direct health-care personnel, the Director's decision not to exempt these positions too amounts to an impoundment of funds which were made immediately available for obligation by 38 U.S.C. § 5010 (a)(4). In this respect, we see no difference in the application of a Government-wide hiring freeze to the VA, or a freeze imposed only on the VA. Both types of actions would prevent the use of budget authority otherwise made immediately available for obligation and therefore constitute impoundments, even though no formal impoundment message has been transmitted to the Congress to date.

CONTENTIONS OF OMB STAFF */

OMB, however, contends that the Director has already complied with the requirements of paragraph 5010(a)(4) by releasing funds and the Congressionally-directed employment ceiling to VA. It apparently is OMB's position that paragraph 5010(a)(4) does not impose a continuing obligation on the Director to maintain the funded VA personnel ceiling throughout the entire fiscal year.

*/ As we have indicated, we have not received any formal written comments from OMB. For the remainder of this decision when we refer to OMB positions or contentions we are referring to the views of OMB staff informally communicated to us.

OMB's interpretation of paragraph 5010(a)(4) would completely defeat the intent of the Congress and we must reject it. As we have indicated, paragraph 5010(a)(4) was enacted specifically to prevent OMB from reducing VA staffing below the congressionally-funded level. It was the intent of the Congress that VA be free to fill all of the positions for which the Congress made annual appropriations. To interpret 5010(a)(4) as allowing the Director to withdraw the personnel ceiling after he had initially granted it would clearly thwart the will of the Congress.

OMB next argues that 5010(a)(4) merely requires the Director to release the positions; it is not a mandate to the VA to actually hire to the full employment ceiling. Therefore, the hiring freeze, which does not actually reduce the ceiling, does not violate the language of the statute.

Certainly, OMB is correct that by its terms 5010(a)(4) does not compel the VA to fill all the positions funded by the Congress. However, the paragraph does require that the Administration not deprive the Administrator of Veterans' Affairs of the authority to fill all the positions should he choose to do so. Clearly it was the intent of the Congress to remove by statute the power of the Administration to reduce VA employment ceilings below the congressionally authorized level. As we have indicated, 5010(a)(4) was enacted by the Congress specifically in response to Administration action which prevented the VA from filling congressionally funded health care positions in fiscal year 1979. In reporting the compromise language which became 5010(a)(4) the House and Senate Veterans' Affairs Committees made it clear that the statue would force OMB to release all congressionally funded positions to VA.

Interpreting 5010(a)(4) to allow OMB to control VA hiring by means of a hiring freeze would be as much contrary to the intent of the Congress as allowing OMB to actually withhold the positions from VA. The OMB Bulletin which implements the freeze purports to deprive the Administrator of Veterans' Affairs of the power to fill the congressionally funded positions, which is not permitted by paragraph 5010(a)(4).

OMB next contends that 5010(a)(4) does not deprive the President of his power to manage the Executive Branch of the Government.

The President's power to manage the Government derives from his constitutional designation as Chief Executive and his responsibility to see that the laws are faithfully executed. However, the President may not use his powers to prevent the law from being fulfilled. See Kendall v. United States, 12 Pet. (37 U.S.) 524, 613 (1838); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974); Walsh v. Brennan, 411 F.Supp. 1172, 1179 (D.D.C. 1979). A presidential order may not override contradictory statutory provisions or policies. Nader v. Saxbe, Interstate Commerce Commission, 590 F.2d 997, 1003 (D.C. Cir. 1978); Wong v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 227 (5th Cir. 1977), rev'd on other grounds, United Steelworkers v. Weber 443 U.S. 193 (1979).

Clearly paragraph 5010(a)(4) directs the Executive not to withhold from the VA the authority to fill the congressionally-funded personnel ceiling. The President cannot use his executive powers to defeat this statute. Rather he has a constitutional obligation to see that it is fulfilled.

OMB contends that to the extent that 5010(a)(4) deprives the President of his executive powers it is contrary to the Constitution. This Office will not consider the constitutionality of congressional enactments in ruling on the legality of Federal agency actions. We consider every Federal law to be valid until such time as a Federal court of competent jurisdiction declares it to be unconstitutional.

OMB finally argues that 5010(a)(4) does not preclude the Administration from using the provisions of the Impoundment Control Act of 1974, 31 U.S.C. § 1400 et seq, to attempt to control Federal expenditures. OMB indicates that it intends to propose a deferral of budget authority for the VA positions not filled and to instruct VA to use this budget authority later in the fiscal year in lieu of a supplemental to cover the costs of the Federal pay increase. We do not think the President's impoundment authority is available, however, to defeat a clear congressional mandate that certain funds be made immediately available for obligation.

On April 16, 1980, the President proposed a deferral (D80-65) of funds available for the Federal-Aid Highways Program. Several district courts held that the fourth disclaimer in the Impoundment Control Act, 31 U.S.C. § 1400(4), precluded the President from impounding funds by reducing the obligational ceiling established by Congress and, thereby, reducing the allotments to the states. */ The courts held that the fourth disclaimer exempts from the application of the Impoundment Control Act any law "which requires the obligation of budget authority or the making of outlays thereunder." The statute involved in the Highway cases requires the Secretary of Transportation to allot funds to the states by formula, subject to an obligational ceiling. Reducing the obligational ceiling would have had the effect of reducing the states' allotments, and, therefore, the amount that could be obligated to and expended by the states. Though the fourth disclaimer speaks in terms of obligations and outlays and the Federal-Highway Act's mandatory requirement is in terms of the

*/ In the 1981 Supplemental Appropriations and Rescissions Act, the Congress rendered the question of the legality of deferral D80-65 moot. Accordingly, in cases pending before courts of appeals, the district courts' rulings were vacated. However, we believe the analysis contained in many of these cases is useful and provides guidance in the situation before us.